84-717

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No. _____

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1984

RICHARD C. LUSSY,
Plaintiff/Appellant,

— v —

MARK S. DAVIDSON, and the law firm of WILLIAMS, LANZA, KASTNER & GIBBS; ARDEN C. McCLELLAND and the law firm of McCLELLAND LAW OFFICES, P.C.,
Defendants/Respondents.

Appeal from the Montana State Supreme Court

JURISDICTIONAL STATEMENT

RICHARD C. LUSSY
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19pp

QUESTIONS PRESENTED

1. Both lower courts ruled in favor of the lawyer defendants/respondents on the basis of "confusion" and in the absence of guidance from the U.S. Supreme Court on how to evaluate identified acts & omissions of defense counsel. The guidance, however, only recently came of public record in the case: *United States v. Cronic, Syllabus, Certiorari* To The United State Court of Appeals For The Tenth Circuit, No. 82-660. Argued January 10, 1984— Decided May 14, 1984. 675 F. 2d 1126, reversed and remanded, cited in 44 CCH S. Ct. Bull. P. B2695.

2. Is the Defendants/Respondents as Civil Counsel to Plaintiff/Appellant ineffectiveness:

A- that appellant/plaintiff's right to effective assistance of counsel under the Sixth Amendment violated?

B- that a true adversarial civil trail had been conducted, the kind envisioned by the Sixth Amendment?

C- that respondents/defendants failed to function in any meaningful sense by pointing to specific errors made by trial counsel?

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CONSTITUTIONAL PROVISIONS

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IN THE

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RICHARD C. LUSSY, *Plaintiff/Appellant,*

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MARK S. DAVIDSON, and the law firm of WILLIAMS, LANZA, KASTNER & GIBBS; ARDEN C. McCLELLAND and the law firm of McCLELLAND LAW OFFICES, P.C.,
Defendants/Respondents.

JURSIDICTIONAL STATEMENT

OPINIONS BELOW

RICHARD C. LUSSY ("Lussy"), appellant/plaintiff herin, appeals from the February 29th, 1984 decision of the Montana State Supreme Court upholding the constitutionality of Lussy's right to both, effective (civil court) assistant of counsel under the Sixth Amendment having been violated, and effective equal protection of the laws under the Fourteenth Amendment, Section 1 having been violated.

The Montana Supreme Court's opinion is referenced in the Appendix A, 1 through 3. The Third Judicial District for Deer Lodge County, Anaconda, Montana Order is referenced in the Appendix, B, 1 and 2. The Notice of Appeal to the Montana Stata Supreme Court is referenced in Appendix C, 1 and 2. The Notice of Appeal to the U.S.

Supreme Court is referenced in Appendix D, 1 and 2.

GROUNDS OF JURISDICTION

No seperate judgment was entered in the District Court against Lussy, other than a finding of liability for defamation (libel) favoring lawyer Wade J. Dahood. The subject lawsuit followed *Dahood v. Lussy* (78-12773) with an Order favoring defendants/respondents on December 20th, 1983 (B-2) (no seperate judgment entered). Followed by the Montana Supreme Court Summary Opinion filed on March 1st, 1983 (A-3).

JURISDICTION of this Court is invoked under 42 U.S.C. Section 1983, 1985(b)[1]. Notice of appeal to this Court was duly served on March 13, 1984 and timely received in the Montana Supreme Court on or about March 15th, 1984 (D-2). See 28 U.S.C. Section 1331.

[1]The case caption contains the names of all parties. Lussy is an individual acting for himself.

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution:

. . . and to have the assistance of counsel for his defense . . .

Fourteenth Amendment, United States Constitution (Section 1):

. . . All persons born or naturalized in the United States... No state shall make or enforce any law,... nor deny to any person within its jurisdiction the equal protection of the laws . . .

STATEMENT OF CASE

Lussy was found liable for defaming (libel) a lawyer by the name of Wade J. Dahood. The current respondents/defendants were his legal counsel at the time of the finding of

his liability for making this defamatory comment. Upon the finding of liability a settlement out of court was paid by Wade J. Dahood totalling $125,000. The settlement included two other lawsuits filed by Lussy against Dahood complaining about the theft of $210,000 in promissory notes (capitalized), $30,000 in a judgment for endorsing a promissory note on behalf of the investment entity and approximately $500,000 in outstanding liabilities. Lussy had paid to that date $118,000 in legal fees.

The defamatory remark concerned itself with whether the statement made was true or false. The fact of whether or not, the Estate of Ben Gwynn was geing defrauded as the Lussys were being defrauded (10/8/83 Memorandum in support of Plaintiff's Motion for Summary Judgment, Page 8, 2nd paragraph). Wade J. Dahood was the lawyer in charge of both legal counsel for the investment entity and of the Estate of Ben Gwynn.

Defendants/Respondents counsel successfully argued that the evidence presented by Lussy in his defense by Lussy himself was later in time than the date of the defamatory statement. Only two pieces of evidence be required to prove Lussy's innocence (1) a 4/16/73 financial statement of Ben Gwynn indicating a Net Worth of $1,243,428. And (2) a inventory and Appraisement of Ben Gwynn's Probate (no. 1834) indicating a Total Value of All Property of $830,959. The next critical point is to ascertain whether these two pieces of evidence were available before the finding of liability against Lussy and entered in the record as **unobjected to** evidence. (1) Mark Davidson's deposition of 9/27/83 p 35, lines 1 through 17, p 46, lines 20 through 25 and p 47, lines 1 through 21, demonstrate that the financial statement and commentary were available to him. (2) Mark Davidson's deposition of 9/27/83, p 24, line 25 and page 25, lines 1 through 9 demonstrate that the probate file including the Inventory and Appraisement were

Unobjected to exhibits of evidence. Hence both (1) and (2) were fair game and to be appropriately used. The conclusion is (1) subtracted from (2) demonstrates an amount missing or stolen totalling $414,468.60

FEDERAL QUESTIONS ARE STRAIGHTFORWARD

Both lower courts were apparently "confused" and indicate so by stating that Lussy's motion and brief amount to little more than incoherent rambling (1).

2. Lussy requests *United States v. Cronic,* decided 5/14/84 to be implimented herein. That the respondents/defendants performance was not only inadequate but that the errors actually had an adverse effect on the defense. Lussy meets this test by demonstrating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

3. Lussy requests this court to review the constitutional implications of this matter.

CONCLUSION

The decision of the Montana Supreme Court undermines fundamental Sixth and Fourteenth Amendment principles and conflicts with decisions of this Court. The questions presented by this appeal are simple and straightforward, yet substantial. Lussy urges this Court to note probable jurisdiction and to set the case for full briefing and argument on the merits.

Respectfully submitted,

Richard C. Lussy
Attorney for Appellant
And Counsel of Record

CERTIFICATION OF SERVICE BY MAILING:

R.C. Lussy duly certify that the foregoing document was placed in the U.S. Express Mail system from Seattle, Washington this 29th day of May, 1984. Opposing Counsel as herein noted was copied by the same:

RONALD F. WATERMAN
Gough, Shanahan, Johnson & Waterman
301 First National Bank Building
P.O. Box 1715
Helena, Mt. 59624

By: Richard C. Lussy

Appendix reprinted to comply with rules, remailed 2nd day of November 1984. Three copies to opposing counsel above referenced.

By: Richard C. Lussy

APPENDIX A, B, C & D

APPENDIX A (1 of 3)

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 84-76

RICHARD C. LUSSY,
Plaintiff & Appellant,

v.

MARK S. DAVIDSON and the law firm of WILLIAMS, LANZA, KASTNER & GIBBS, ARDEN C. McCLELLAND, and the law firm of McCLELLAND LAW OFFICES, P.C.,
Defendants & Respondents.

FILED
MAR 1- 1984
Ethel M. Harrison
CLERK OF SUPREME COURT
STATE OF MONTANA

SUMMARY OPINION

PER CURIAM:

This is an appeal from a summary judgment arising from an action filed in the Third Judicial District, County of Deer Lodge, Montana. Appellant filed a legal malpractice action in which plaintiff alleged defendant attorneys were negligent in their defense of plaintiff in a prior libel action.

Richard Lussy and his father, Henry Lussy, became involved with other investors in a townhouse project in Anaconda, Montana, during the 1970s. Financial difficulties ensued and litigation among the investor partners and between the partners and the principal lender for the development occurred.

Lussy filed a claim against some of the co-investors alleging securities violations with action pending in state and federal court. Sometime during the litigation, Lussy made certain statements which generally accused a banker, Frank Bennett, and Wade Dahood of improperly handling the estate of Ben Gwynn. Gwynn was one of the investors in the townhouse development. The statement accused the banker and attorney of depriving the decedent's widow of the fee payable to a personal representative of the estate. Dahood sued Lussy in state court for the libelous statement. During the litigation, attorneys Davidson and McClelland, defendants in the present action, represented Lussy.

The alleged malpractice arose when defendants failed to introduce certain evidence in support of the defense of truth. The evidence did not come about until nearly a year after the publication of the defamatory statement.

Defendants moved for summary judgment, oral argument was heard and the Deer Lodge County District Court issued an order granting defendant's motion December 20, 1983.

The issue presented on appeal is: Did the District Court properly grant defendant's motion for summary judgment in a legal malpractice suit in which the alleged malpractice consisted of attorneys' refusal to introduce evidence in support of the defense of truth that post-dated the defamatory statement?

Appellant Richard Lussy is not stranger to this Court. Mr. Lussy did not oppose defendant's motion for summary judgment with supporting affidavits or memorandum. Instead, he chose to move for summary judgment himself. In the words of Judge Sullivan, this motion and accompanying brief "amount to little more than incoherent rambling."

The law concerning introduction of evidence in support of a defense of truth to a defamation action is well settled. The truth of the defamatory statement must be determined at

the time the statement was made. Therefore, the evidence on which appellant bases his malpractice suit was not admissable even if his attorneys had attempted to introduce it.

We find appellant's pro se brief incoherent for all practical legal purposes and does not merit further consideration. The motion for summary judgment was properly granted by Judge Sullivan.

The appeal is frivolous and so lacking in merit that it is denied summarily.

DATED this 29th day of February, 1984.

Justices

John Conway Harrison
John J. Sheehy
Fred J. Weber
L.L. Gulbrandson

Mr. Chief Justice Frank J. Haswell did not participate in this decision.

APPENDIX B (1 of 2)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA IN AND FOR THE COUNTY OF DEER LODGE

RICHARD C. LUSSY,
Plaintiff,

vs. **CAUSE NO. DV-83-34**

MARK S. DAVIDSON, and the law firm of WILLIAMS, LANZA, KASTNER AND GIBBS: ARDEN C. McCLELLAND LAW OFFICES, P.C.,

Defendants.

ORDER

This cause came on regularly for hearing on October 13, 1983 upon cross motions for Summary Judgment. Plaintiff RICHARD LUSSY appeared pro se and Attorney RON WATERMAN appeared for the defendants at the hearing. Plaintiff's suit alleges that the defendants were negligent in their defense of plaintiff in a prior legal action. His main contention is that the defendants failed to introduce certain evidence in support of the defense of truth. The evidence in question did not come about until nearly a year after the publication of the defamatory statement. However, the truth of a defamatory statement must be determined at the time the statement is made. Therefore, the evidence would not have been

admitted or considered by the court. Failure to present the evidence in question does not mean the defendants were negligent in their defense of plaintiff.

Plaintiff, rather than responding to the summary judment motion made by the defendants, has proceeded to move for summary judgment himself. This motion and brief amount to little more than incoherent rambling. It does not establish when any defendant committed malpractice and there is no fact in the record which would entitle plaintiff to summary judgment against the defendants. Now, therefore, after considering the pleadings, briefs, oral arguments, plaintiff's failure to properly repsond to defendant's motion, defendant's affidavit and being fully advised in these premises:

IT IS HEREBY ORDERED that the defendant's motion for summary judgment is granted; and

IT IS FURTHER ORDERED that plaintiff's motion for summary judgment is denied.

DATED THIS 20th DAY OF DECEMBER, 1983.

MARK P. SULLIVAN

DISTRICT JUDGE

APPENDIX C (1 of 2)

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF DEER LODGE

RICHARD C. LUSSY, *Plaintiff,*	)	**Cause No. DV 83-84**
vs.	)	**NOTICE OF APPEAL**
MARK S. DAVIDSON and the law firm of WILLIAMS, LANZA, KASTNER AND GIBBS: ARDEN C. McCLELLAND LAW OFFICES, P.C., *Defendants.*	)	**Filed Dec. 23, 1983** **CLERK**

Pursuant to M.R.Civ.P. No. 72 Appeal from a district court to the Supreme Court, this NOTICE OF APPEAL is hereby submitted. The decision is that of the Plaintiff's Motion for Summary Judgment orally argued on 10/13/83, and decided by Judge Mark P. Sullivan on the 20th day of 1983, copy received the 23rd day of December, 1983. A copy of the decision is attached hereto.

That RAP No. 6 requires an undertaking for appeal. A $500 cashiers check has been submitted to the Clerk of the District Court.

That RAP No. 9(b) requires a transcript of proceedings. Appellant advises that such a transcript of the 10/13/83 has been ordered together with a check for $40, No. 1190 for cost of transcript.

That immediately following receipt of transcript or within 10 days (RAP 9a) a designation of the clerk's record will be undertaken.

Pursuant to RAP 11a & b the filing of record will be accomplished within 10 days of this Notice of Appeal. The opening brief will therefore be provided immediately after the receipt of transcript.

Done filed and mailed to the Deer Lodge County Court and to opposing counsel Waterman this 23rd day of December, 1983. Certified by the undersigned.

by

Plaintiff

Richard C. Lussy
2565 Magnolia Blvd. W.
Seattle, WA 98199

ATTORNEYS:

RICHARD C. LUSSY
2565 Magnolia Blvd. W.
Seattle, Washington 98199
Appellant Pro Se

RECEIVED
MAR 15 1984
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RONALD F. WATERMAN
GOUGH, SHANAHAN, JOHNSON & WATERMAN
301 First National Bank Building
P.O. Box 1715
Helena, Montana 59624
Lawyers for Respondents

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE MONTANA STATE SUPREME COURT

RICHARD C. LUSSY,	)	
Plaintiff/Appellant,	)	**Montana State**
	)	**Supreme Court**
	)	**Number 84-76**
vs.	)	**NOTICE**
	)	**OF APPEAL**
MARK S. DAVIDSON and	)	
the law firm of WILLIAMS,	)	
LANZA, KASTNER &	)	
GIBBS: ARDEN C.	)	
McCLELLAND, and the law	)	
firm of McCLELLAND LAW	)	
OFFICES, P.C.,	)	
Defendants/Respondents.	)	

COMES NOW the Plaintiff/Appellant Pro Se, Richard C. Lussy hereby gives this notice of appeal to the supreme court of the United States from the final judgment/order filed on the 1st day of March, 1984 by the Clerk of the Supreme Court of the State of Montana Ethel M. Harrison. A copy entitled Exhibit A is attached for your convenience, as derived from the Order dated the 20th day of December, 1983, of the Honorable Mark P. Sullivan, District Judge, for the Third Judicial District, Deer Lodge County, Montana (Exhibit B attached for your convenience).

(a) That this appeal is authorized under Article III of the Constitution of the United States and docketed under Rule 12;

(b) That this appeal is undertaken without prejudice and within the principles of American Jurisprudence a.k.a. judicial error & protectionest guild practices i.e. unconscionability as defined in Peirick v. Peirick, 641 S.W. 2d 195. Mo. App. 1982; V. .M.S. Chapter 452.325, subd. 2, 452.330, subd.

DONE, dated and mailed this 13th day of March, 1984.

By

Richard C. Lussy
2565 Magnolia Blvd. W.
Seattle, WA 98199

Appellant/Plaintiff Pro Se

CERTIFICATE OF MAILING this 13th day of March, 1984 by the Appellant R.C. Lussy as required under Rule 28, to the following parties:

Clerk of Montana
Supreme Court
Room 323, Justice Building
Helena, Mt. 59620

Clerk of District Ct.
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By
R.C. Lussy